



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. E732 OF 2021**

**ABDALLA MOHAMMED SHEIKH.....1<sup>ST</sup> APPELLANT/APPLICANT**

**MODERN COAST EXPRESS LTD.....2<sup>ND</sup> APPELLANT/APPLICANT**

**-VERSUS-**

**ALICE NJERI & HANIEL KARANJA NJERU (Suing as the legal representatives of the estate of  
PATRICK MURIITHI KARANJA-Deceased).....RESPONDENTS**

**RULING**

1. This ruling relates to the Notice of Motion dated 27<sup>th</sup> January, 2022 taken out by the 1<sup>st</sup> and 2<sup>nd</sup> appellants/applicants and supported by the grounds set out on its body and the facts stated in the affidavit of advocate Anertia Salinder Gulenywa. The order being sought is for a stay of execution of the judgment delivered on 8<sup>th</sup> October, 2021 in Milimani CMCC No. 1646 of 2014 pending the hearing and determination of the appeal against the aforesaid judgment. The applicants also sought for an order for provision of security by way of a bank guarantee from a reputable Bank.
2. The 1<sup>st</sup> respondent replied to the Motion by way of the replying affidavit she swore on 9<sup>th</sup> February, 2022.
3. At the interparties hearing of the Motion, the parties' respective advocates relied on the averments made in the respective affidavits.
4. I have considered the grounds laid out on the body of the Motion; as well as the facts deponed in the supporting and replying affidavits respectively.
5. As earlier indicated, the main order being sought is that of a stay of execution of the decree pending appeal.
6. The guiding provision is Order 42, Rule 6(2) of the Civil Procedure Rules which sets out the following conditions in determining an application for stay.
7. The first condition states that the application must have been made without unreasonable delay. On the one part, the applicants are of the view that the instant Motion has been brought without unreasonable delay, while the respondents on the other part state that there has been inordinate delay in bringing the Motion.
8. Upon my study of the record, it is apparent that the impugned judgment was delivered on 8<sup>th</sup> October, 2021 while the Motion was filed on 28<sup>th</sup> January, 2022. In my view, the delay of about three (3) months is not unreasonable.
9. The second condition touches on substantial loss to be suffered by an applicant. In her supporting affidavit, Anertia Salinder Gulenywa describes the applicants' apprehension that unless an order for a stay of execution is granted, it is likely that they will not be able to recover the decretal sum from the respondents once the same is paid to them and the appeal succeeds; adding that the respondents have not tendered any documentary evidence to show their financial capabilities to refund the decretal amount where necessary.
10. In reply, the respondents state that substantial loss has not been demonstrated by the applicants in order for this court to grant the order for a stay of execution sought herein, adding that they are self-employed and earning a monthly salary of Kshs.500,000/= and hence able to

refund the decretal sum.

11. The question on who has the burden of proof on the issue of refund of the decretal sum was considered by the Court of Appeal in the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** where it held thus:

**“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”**

12. In the absence of anything to indicate or ascertain the respondents’ financial standing, I am satisfied that the applicants have reasonably shown the likelihood of substantial loss occurring should the order for a stay of execution be denied.

13. Under the final condition which is the provision of security for the due performance of such decree or order, the applicants have indicated their readiness and willingness to furnish a bank guarantee from Family Bank as security, whereas the respondents through their advocate state that the 1<sup>st</sup> respondent is a widow with four (4) children and hence the applicants should be ordered to pay her 50% of the decretal sum and deposit the remaining balance of the same.

14. Upon considering the rival sentiments above, I am of the view that a bank guarantee from a reputable bank suitable in the circumstances.

15. Upon my further perusal of the record, particularly a copy of the impugned judgment, the same confirms the position stated by the respondents concerning the deceased being married and leaving behind four (4) minor children. I am therefore satisfied that it would be fair and reasonable that the respondents receive a share of the decretal sum for purposes of supporting the dependants of the deceased.

16. Consequently, the Motion dated 27<sup>th</sup> January, 2021 succeeds, giving rise to the following orders:

**i. There shall be a stay of execution of the judgment delivered on 8<sup>th</sup> October, 2021 on the condition that the applicants pay to the respondents 1/3 of the decretal amount (Kshs.2.888,562.70) and deposit the remaining 2/3 of the decretal sum (Kshs.5,777,125.30) in an interest earning account to be held in the joint names of the parties’ advocates/firm of advocates within 45 days from today, failing which the order for stay shall automatically lapse.**

**ii. Costs of the application to abide the outcome of the appeal.**

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 25<sup>TH</sup> DAY OF MARCH, 2022**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the 1<sup>st</sup> and 2<sup>nd</sup> Appellants/Applicants

..... for the Respondents